DISTRICT OF COLUMBIA
COMMISSION ON HUMAN RIGHTS

In the Matter of:

CARY SPIRES
Complainant

v. Docket No.: **00-121-P (CN)**

GEORGE WASHINGTON UNIVERSITY MEDICAL CENTER
Respondent

_____/

BEFORE

Commissioner Christina Fleps
Commissioner Donald F. Lippert
Commissioner Susan Blue

APPEARANCES

For the Complainant

Jewel T. Little, Esquire
441 4th Street, N.W., Suite 570N
Washington, D.C. 20001

For the Respondent

Alan S. Block, Esquire
Andrew J. Marcus, Esquire
Bonner Kiernan Trebach & Crociata
1250 Eye Street, NW – 6th Floor
Washington, DC 20001
202-712-7000

FINAL RULING AND ORDER ON RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Pursuant to 4 DCMR §426.1, the Respondent, the George Washington University Medical Center (hereinafter Medical Center) filed a motion for summary judgment requesting the Commission find that it is entitled to judgment as a matter of law because there are no material facts in dispute.

Pursuant to 4 DCMR §430.1 and 4 DCMR §430 .2, the Tribunal recommends sustention of the Hearing Examiner's Proposed Decision and Order. "Any party adversely affected … may file a written application for reconsideration in accordance with 4 DCMR §431.1, within fifteen (15) calendar days of receipt of this Final Decision and Order. …" 4 DCMR §430.1 et seq.

Summary of the Case

Complainant, Cary Spires, was employed as a Senior Echo Technician with the Medical Center in June 1999[1]. He was assigned to work in the Echocardiology Department (hereinafter ED), and was responsible for performing cardiac sonography (two dimensional pictures of the heart) on patients.

In October 1999, a party was held for a white manager who was leaving the Medical Center, and all staff was invited to attend. Some short time thereafter, a black employee left the Medical Center, and Complainant voiced concerns about a party being given for her as well. Complainant avers that in response to his inquiries, two *white* supervisors told him that a party would not be given for the black employee. Complainant further avers that he informed one of the *white* supervisors "even if (the

[1] ***See*** Complainant's *Discrimination Complaint*, Page 3, Number 2(k).

black employee) mopped floors for nineteen (19) years, she deserved a party[2]." Thereafter Complainant alleged that he used his "own money and monies collected from other ED staff, and organized a farewell party for the black employee in the cafeteria" of the Medical Center[3].

On or about January 21, 2000, the Complainant was issued a written reprimand for his "reluctance to use the GE machine for Echo's…he insists on using the HP machine." *Respondent's Exhibit No. 5*.

On or about January 31, 2000, the Complainant was suspended for two days for "refusal to carry out a reasonable order"[to sign in or out per instructions]. The write up and subsequent suspension resulted from Complainant's "failure to sign in or out on six occasions over the last two weeks" in violation of policy. *Respondent's Exhibit No. 6*

On or about January 24, 2000, Complainant wrote a response to the January 21, 2000 discipline about his reluctance to use the GE machine, alleging inter alia that "my only reluctance in using the GE machine was due to lack of training that I've received on this system … I received only one-day training and any additional training … scheduled, was never performed." *Respondent's Exhibit No. 5*.

On or about February 1, 2000, Complainant wrote a letter as a follow up response to "the interaction that took place on January 31, 2000, which resulted in [his] suspension. In that letter he mentions a "manager/employee interaction addressing the issue of insubordination resulting from when [he] used the HP 1000 as opposed to the GE System." In that letter, Complainant states, inter alia, that "insubordination was not my

[2] ***See*** Complainant's *Discrimination Complaint*, Page 3, Number 2(b).
[3] Both Complainant and Respondent agree that a party was given for the black employee, and that all staff was invited to attend. Respondent avers that it provided a gift and cake for the black employee.

motive but my decision was due to the lack of confidence in my ability to transport and operate the GE System in the time allotted[4]."

On or about February 4, 2000, Complainant *"sought counseling from Respondent's Employee Assistance Program (EAP) because of the stress I was feeling from the treatment I was receiving from my supervisors[5]."* As part of his conversation with the EAP counselor, Complainant threatened to commit acts of bodily harm against his supervisors. Because of his training and expertise, which made him believe that the threats were very realistic possibilities, the EAP counselor reported the threats to appropriate administrators.[6]

On or about February 7, 2000, the Chief Operating Officer terminated Complainant's employment with the Medical Center following an investigation. Upon his termination from the G.W.U. Medical Center, Complainant filed an action with the District of Columbia Office of Human Rights (hereinafter the Office) alleging that he was terminated because of his race (Black), and that he was the victim of retaliation for complaining about the Medical Center's disparate treatment of a black employee when it refused to giver her a party upon her retirement.

The Office investigated the matter and determined that the Complainant established a ***prima facie*** case on the issue of discrimination based on his race (Black). Specifically, Complainant alleges that he "believed that Respondent treated me differently than my similar situated white co-workers…."[7] Additionally, the Office

[4] Respondent's Exhibit of Letter from Cary R. Spires dated February 1, 2000.
[5] Complainant's *Discrimination Complaint* entered as *Exhibit No. 5, page 3, ¶k*
[6] **See** Deposition of EAP Counselor Todd Handelman, Pages 23-24.
[7] Complainant's *Discrimination Complaint* entered as *Exhibit No. 5, page 3, ¶l*

determined that the Complainant engaged in protected EEO activity, and was therefore the subject of retaliation.

On August 7, 2002 the matter was certified to the District of Columbia Commission on Human Rights (hereinafter the Commission) when efforts to resolve the complaint, via conciliation, failed.

The issues the Commission has to address are whether the Complainant was subjected to retaliation for complaining of differential treatment between black and white employees[8] or whether the Complainant was terminated based solely on threats to physically harm his supervisors, and was Complainant subjected to disparate treatment because of his race (black).

Summary Judgment Standard of Review

Summary judgment is granted when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *See Celotex Corp v. Catrell, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court views the evidence in the light most favorable to the nonmoving party, according that party the benefit of all reasonable inferences. *See Anderson v. Liberty Lobby Inc., 477 U.S. 242, 255, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986).* To prevail upon a motion for summary judgment, the moving party must clearly demonstrate that there is no genuine issue as to any material fact, and that he or she is entitled to judgment as a matter of law. *Beard v. Goodyear Tire and Rubber Co.*, 587 A.2d 195 (D.C. 1991), citing *Holland v. Hannan*, 456 A.2d 807, 814 (D.C.) 1983). Thus, in ruling on a motion for summary judgment, the Court will grant summary judgment only if the moving party is entitled to judgment as a

[8] Complainant alleges that those complaints that he made were protected activity, which would subject him to the protections of the District of Columbia 1977 Human Rights Act as amended September 2002.

matter of law upon material facts that are not in dispute. *Ferguson v. Small, 252 F. Supp. 2d 31, 37 (2002).*

If a moving defendant has made an initial showing that the record presents no genuine issue of material fact, then the burden shifts to the plaintiff to show that such an issue exists. *Beard, supra,* 587 A.2d 195 (D.C. 1991) citing *Landow v. Georgetown-Inland West Corp*., 454 A.2d 310, 313 (D.C. 1987). The defendant's initial showing can be made by pointing out that there is a lack of evidence to support the plaintiff's case. *Beard, supra,* 587 A.2d 195 (D.C. 1991) citing *Celotex Corp. v Catrell*, 477 U.S., 317, 325, 106 S. Ct. 2548, 91 L.Ed.2d 265 (1986).

In opposing summary judgment, an adverse party "may not rely on vague allegations but instead must present specific facts showing that there is a genuine issue for trial." *Graff v. Malawar,* 592 A.2d 1038, 1040 (D.C. 1991). The non-moving party must do more than simply "show that there is some metaphysical doubt as to the material facts." *Jones v. Blake Construction Co., Inc*., 2002 U.S. Dist. LEXIS 17032 (September 10, 2002). Moreover, any assertions in the movant's affidavits will be accepted as being true unless the opposing party submits his own affidavits or other documentary evidence contradicting the assertion. *Id*. Conclusory allegations by the non-moving party are insufficient to establish a genuine issue of material fact or to defeat the entry of summary judgment. *Beard, supra,* 587 A.2d 195 (D.C. 1991) citing *Mosely v. Second New St. Paul Baptist Church,* 534 A.2d 346, 349 (D.C. 1987). Furthermore, "the existence of a factual dispute [will not] defeat a summary judgment motion when the dispute does not concern ***a genuine issue of material fact*** (emphasis added*)*." *Anderson, supra,* 477 U.S. 242, 247 –48 (1986). To be material, the fact must be capable of affecting the outcome of the

litigation; to be genuine, the issue must be supported by admissible evidence sufficient for a reasonable trier of fact to find in favor of the nonmoving party. *Id.* Thus, [a]n adverse party must set forth facts showing that there is a genuine issue for trial. *Beard, supra,* 587 A.2d 195, 199 (D.C. 1991).

Establishing A *Prima Facie* Case of Retaliation

A prima facie case of retaliation is established when Respondent demonstrates that (1) he was engaged in a statutorily protected activity; (2) that his employer took adverse action against him; and (3) that a causal connection existed between the protected activity and the adverse action. *Thomas v. National Football League Players Ass'n* 327 U.S. App. D.C. 348, (D.C. Cir. 1997), See *also, Carter-Obayuwana v. Howard University,* 764 A.2d 779, 790 ((2001 D. C. App.)

The Complainant, in order to prevail in a case of discrimination or retaliation "must establish [his] prima facie case of prohibited discrimination or retaliation." *McDonnell Douglas v. Green 411 U.S. 792, 802-805 (1973).* If the Complainant succeeds in making out a prima facie case, the burden of production shifts to the Respondent to articulate some legitimate, non-discriminatory or retaliatory reason for the challenged action. *Texas Dept of Community Affairs v. Burdine*, 450 U.S. 248, 257 (1981). Once the [Respondent] articulates a sufficient reason, the presumption raised by the prima facie case is rebutted and the burden shifts back to the [Complainant] to produce some evidence, either direct or circumstantial, to show that the [Respondent's] proffered reason for its actions is a mere pretext for discrimination or retaliation. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-08 (1993). Summary judgment in such a case is appropriate where either the evidence is insufficient to establish a prima facie

case … or assuming a prima facie case, there is no genuine issue of material fact that the [Respondent's] articulated non discriminatory or non-retaliatory reason for the challenged decision is pretextual. *Paul v. Federal Nat'l Mortgage Ass'n*, 697 F. Supp. 547, 553 (D.D.C. 1988).

In evaluating the evidence, "the plaintiff's attack on the employer's explanation must always be assessed in light of the total circumstances of the case…." *Aka v. Washington Hosp. Ctr*., 332 U.W. App. D.C. 256, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc). The Court … does not consider the wisdom or justice of an employer's personnel decision unless the decision was based on a motive forbidden by … statute. *Milton v. Weinberger*, 225 U.S. App. D.C. 12, (D.C. Cir. 1982) The Supreme Court has confirmed that an employer has "significant other prerogatives and discretions in the course of the hiring, promoting, and discharging of their employees*." McKennon v. Nashville Banner Pub. Co.,* 513 U.S. 352, 361 (1995).

The Supreme Court has stated that the burden on the Complainant for establishing the prima facie case is not onerous. *Burdine, supra , 450 U.S. at 253.* In meeting the ultimate burden, Complainant may rely on a combination of "three possible sources of evidence: (1) evidence used to establish the prima facie case; (2) evidence that the defendants proffered explanation for his termination was false; and (3) any additional evidence of discriminatory motive." *Ferguson v. Small, supra at 37 quoting Waterhouse v. District of Columbia, 298 F. 3d 989, 993 (D.C. Cir. 2002)*.

1. Protected Activity

To satisfy the first prong of a prima facie case for retaliation, the Complainant "need only prove that [he] had a reasonable good faith belief that the practice [he]

opposed was unlawful under the [Act], not that it violated the Act. *Green, supra,* 652 A.2d at 48. Whether actions by an employee constitute protected activity is a question of law. *Carter-Obayuwana v. Howard University*, 764 A.2d 779, 790 (D.C. 2001). The Complainant engaged in protected activity … if he opposed activity [he] reasonably believed to be [discriminatory] and a violation [of the Act]. *Id.* Protected activity need not take the form of a lawsuit or of a formal complaint to an enforcement agency such as the EEOC or the OHR. On the contrary, the protections … extend to an employee's informal complaints of discrimination to his or her superiors within the organization. In fact, internal complaints have been held to constitute **clearly protected activity** (emphasis added). *Id. at* 790 – 791.

Complainant states that the Respondent retaliated against him by terminating him because he had voiced a complaint about unlawful discrimination when a "white retiring manager was given a retirement party, but a retiring Black employee … was not given a retirement[9]." And arguably that concern could be considered a "protected activity" to the extent that the Complainant believed [at the time] that the only differences between the two employees was that one was white and one was black, [because at some point, he had to report to both of them] therefore there seemed to be acts of "unlawful discrimination[10]."

[9] *SEE Complainant's Motion in Opposition to Respondent's Motion for Summary Judgment*, "Summary of Material Facts in Dispute, page 1, ¶ 1.

[10] Complainant's comments about the appearance of differential treatment of the two employees based on the color of their skin may not arguably rise to the level of protected activity. As Respondent argues, Complainant did not know who gave the party for the white employee, i.e., was it management. Nor did Complainant know if the retiring employees were **similarly situated** in terms of their positions. At the deposition of Complainant, he admits at that time, that he does not know who gave the party for the retiring white employee or what the job position(s) were for each employee. He additionally admits that he only noted the difference in their skin color, which was enough for him to **assume** (emphasis added) that they were being treated differently based on skin color, only. *Deposition of Complainant Cary Spires at pages 52, 53 and 58.*

The District of Columbia Human Rights Act of 1977 specifically prohibits retaliation against a person "in the exercise or enjoyment of, or on account of having exercised … any right granted or protected under this chapter." *Human Rights Act of 1977 (As Amended September 2002) Title 2 Chapter 14, §2-1402.61 (a).* In other words, it is an unlawful discriminatory practice for an employer to retaliate against a person on account of that person's opposition to any practice made unlawful by the [Act]. *Howard University v. Green,* 652 A.2d 41, 48 (1994 D.C. App.).

That he was mistaken about the black employee's job description and her position is not an issue, because there was a good faith belief by Complainant that his concerns were legitimate, and that the Medical Center was engaged in an unlawful and discriminatory activity. It is well established by "every circuit that has considered the issue … that opposition activity is protected [even] when it is based on a mistaken good faith belief that Title VII [type] rights have been violated. *Ferguson v. Small,* 225 F. Supp. 2d 31, 38 (D.C. Dist. Ct. 2002).

The Commission believes that the verbal complaint of perceived discrimination made to the two supervisors about the party situation for the black employee is protected activity, and therefore, the first prong of the test is met.

2. Adverse Action

It is undisputed that the Complainant was discharged on February 7, 2000, approximately three to four months since the complaint about the party, which was given in October 1999. That discharge is deemed an adverse personnel action, which satisfies the second prong of the prima facie case.

3. Causal Connection

The third prong of the test that Complainant must satisfy is a showing that there was a causal connection between his complaint and his termination. The Complainant was terminated in February 2000. He made the comment about the disparity in giving a party for a black employee in October 1999.

The casual connection may be established by showing that the employer had knowledge of the employee's protected activity, and that the adverse personnel action took place shortly after that activity. *Carter-Obayuwana, supra,* 764 A.2d 779, 793 (D.C. 2001).

Complainant argues that the "causal connection between [his] complaints of disparate treatment and his termination for threatening violence against his supervisors is the compilation of disciplinary actions against him in his personnel file." (*Complainant's Opposition to Respondent's Motion for Summary Judgment at pages 5-6, ¶4, hereinafter Complainant's Opp.)* He further argues that "upon collaboration of Human Resources personnel and the COO during the internal investigation of [his] threat, the inference is established that [Complainant's] total personnel record played a part in the decision to terminate him. *Id* at 6. Complainant further states that "the COO's office had received a complaint from [him] concerning disparate treatment …[and] the COO and the Human Resources collaborated before the decision was made to terminate him … therefore the inference arises that the disciplinary records kept on [Complainant] can establish a causal nexus between his protected activity and his termination. *Id.* at 6, ¶ ¶*2 - 3*

It is undisputed that Crystal Haynes, the Chief Operating Officer, (hereinafter C.O.O.) made the decision to terminate the Complainant. Indeed, in her affidavit,

Ms.Haynes avers that she "alone made the decision to terminate [Complainant] from employment at GWUH." *Aff. Of Crystal Haynes, page 1, ¶3*. Ms. Haynes further attests that "prior to terminating the [Complainant] [she] was not aware of any allegation from [him] of racially discriminatory practices at GWMU." *Id. At ¶7.* Nor was Ms. Haynes aware of any comments that the Complainant made regarding the disparate treatment of the two retiring employees based on their race. This lack of knowledge by Ms. Haynes is corroborated by the affidavit of Ms. Quinn Collins, R. N., who Complainant could not identify or incorrectly identified in his deposition testimony. In her affidavit, Ms. Collins states that she was the individual present at [the] meeting the Complainant requested with his supervisors, William Enlow and Kevin Castle. *Aff. of Quinn Collins at page 1, ¶4*.

Thus, the Commission is satisfied that Ms. Haynes did not initiate the events that led to Complainant's dismissal as Complainant has alleged in his conspiracy theory. Indeed, beyond making the assertions of collaborations between the COO and others, Complainant does not proffer any evidence to support these claims. Further, the Complainant has not shown that the discriminatory animus of his supervisors, if any, was imputed to Ms. Haynes who made the ultimate decision alone to terminate his employment. To that end, the Complainant has failed to demonstrate a nexus between his protected activity, and his termination. Therefore, he has not illustrated the third element to satisfy a prima facie case of discrimination.

Respondent's Articulated Reason for Termination of the Complainant

Respondent states that Complainant has not established his *prima facie* case of retaliation even though it is undisputed that Complainant suffered an adverse personnel action when he was terminated from the George Washington University Medical Center,

and the Commission agrees. However, assuming arguendo that Complainant could prove his prima facie case of retaliation, Respondent's action of terminating the Complainant was, as Respondent states, "a reasonable response to a credible and serious threat of workplace violence[11]." Specifically, Complainant "had threatened acts of violence against Kevin Castle and William Enlow, two GWU supervisors[12]." He said that he would "stomp the shit out the supervisors and would rip their livers out." *Todd Handelman Deposition, Page 23 (hereinafter Handelman Depo.)*

By way of supporting evidence for the termination, Respondent submits the deposition testimony of Todd Handelman who was the EAP Counselor at the time the threats were made. Mr. Handelman testified that during a telephone conversation, the Complainant expressed his "unhappiness with the situation at work[13]." And, "he expressed his desire to act on his feelings of anger and to, quote, **rip the liver out of his supervisors, and to stomp the shit out of them"**(emphasis added). When Mr. Handelman expressed to the Complainant his belief that the Complainant would act on his feelings and "would do what he said he would do", the Complainant "agreed that this was the case." (*Handelman Depo. at 24*).

Additionally, Complainant "made it clear … that he certainly had the ability to inflict the harm that he was talking about." *(Handelman Depo at 25)*. The Complainant also informed Mr. Handelman that "he was a former extreme fighting champion, and that he knew martial arts and was experienced in hand-to-hand combat." *25)*. Mr. Handelman further testified that the Complainant "would not agree" to promise that he would not hurt anyone. (*Handelman Depo. at 25-26).*

[11] Respondent's *Motion for Summary Judgment*, page 8
[12] *SEE Respondent's Motion for Summary Judgment*, page 1, ¶ 1.
[13] Deposition of Todd Handelman at Page 23

Complainant's sole dispute about his threat to harm someone comes in his Discrimination Complaint, which he has entered as Exhibit No. 5 in his opposition to Respondent's Motion. Complainant contradicts himself in the complaint as follows:

> **Respondent terminated me for allegedly making a threat in my conversation with the EAP Counselor. I did not threaten anyone. Just prior to my termination, Mr. Handleman told me that he did not believe I would harm anyone and invited me to come in for further counseling.**[14]

The statement is contradictory in that Complainant states that he did not make any threats on the one hand. But on the other hand, Complainant alleges that the EAP Counselor said he did not believe he would harm anyone, which is presumably a statement to be made if someone has issued some type of threat. Moreover, Complainant alleges that the reason for his discharge was that, "eventually he took advantage of Respondent's EAP program to assist him with his feelings of stress." "As a result [he] was terminated." (*Complainant's Opposition to Respondent's Motion for Summary Judgment at page 5, ¶3.)*

The Commission believes the deposition testimony of Mr. Handelman, the EAP Counselor. At the deposition of the EAP Counselor, Complainant's questions about the threats made by him, elicited the same response(s) given to the Respondent's questions; that the Complainant said, "he wanted to rip his supervisors' liver out and stomp the shit out of them." *Handelman Depo.*at *38, lines 2 – 3.*

Complainant's Pretext Argument

Complainant has failed in his efforts to show that Respondent's explanation for discharging him was pretextual, and that he was actually fired in retaliation for his

[14] Complainant's *Discrimination Complaint* entered as *Exhibit No. 5, page 3, ¶k*

complaints of discrimination. Most of the factual issues he disputes are not relevant to whether he was retaliated against.

For instance, Complainant argues that his termination was in "retaliation for voicing a complaint of unlawful discrimination in that a retiring White manager was given a retirement party, but a retiring Black employee, who Complainant … understood to be a manager was not given a party." (*Complainant's Statement of Material Facts in Dispute ¶1, page 1).* To support this allegation, Complainant submits portions of his deposition at pages 46 –47 and page 55. After reviewing the specific pages submitted, the Commission does not find the evidence to support this allegation. The pages referenced outline questions about the last name of the black employee, questions about the black employee's actual position, and questions about which floor the black employee worked on as supervisor.

Complainant further argues that the Respondent's reasons for his termination are pretextual, in that he voiced other complaints of discrimination … [which were] made to his supervisors and to GWUH Chief Operation Officer Crystal Haynes' office[15]." Complainant supports this allegation by way of his Deposition at pages 136 – 140. But as before, a review of Complainant's evidence offered by way of his deposition testimony, do not support his claims. That referenced testimony is not testimony so much as the Complainant attempting to respond to a question about who he spoke with in January 2000 concerning "the presence of racial discrimination in the workplace." *Deposition of Cary Spires, page 136, Lines 8 – 10.* Furthermore, the attached transcript from Complainant's deposition does not detail what, if anything, he said to the unknown individual about a problem of discrimination in the workplace.

[15] SEE Complainant's Statement of Material Facts in Dispute, page 1.

Next, the Complainant alleges pretext based on a conspiracy theory, stating that, "GWHU Chief Operating Officer (COO) Crystal Haynes collaborated with personnel in the Human Resources Department and with … supervisors… access[ing] records and files [about] Complainant's employment. (*Complainant's Statement of Material Facts in Dispute, ¶3, page 1).* Complainant contends that this allegation is evidenced by the "affidavits of the COO, and the director and assistant director."

A review of those affidavits indicate that there were communications between the Affiants about the EAP Counselor's report concerning the threat made by Complainant, and the ensuing investigation of same. There is absolutely nothing in those affidavits that would support the theory propounded by the Complainant about collaboration among the Affiants to use his personnel records to terminate him.

Finally, Complainant alleges that Respondent's arguments are pretextual based on the "department level supervisors … retaliatory acts against him [achieved] by compiling records of disciplinary warnings and suspensions in his employment file [which] set into motion the course of events, includ[ing] the EAP consultation, the collaboration of supervisors, human resource personnel, the EAP counselor, and the COO … [all] result[ing] in his termination. (*Complainant's Statement of Material Facts in Dispute, ¶4, page 2).* Complainant's supporting documentation for this allegation is submitted testimony from his deposition at pages 142 – 143.

Yet again, a review of that testimony, in summary, relates only to Complainant's call to the EAP Counselor, and the surrounding circumstances of that call. There is testimony by Complainant, which indicates that he went to the back of the receptionist's desk to make the telephone call to the EAP because he did not want anyone to hear him

talking. And, that the person who answered the telephone got him to talk to a counselor after telling him that the phone call would be confidential. *(Depo. of Cary Spires at 142-143.)*

Complainant's evidence offered by way of his exhibits does not support his allegation that the termination was retaliatory, nor does it support his assertions that the Respondent's reason for his termination was pre-textual, and that he was discharged solely in retaliation for his complaint about the lack of a party being given for a black employee. In effect, the Complainant offers nothing to support or corroborate his assertions of retaliation for engaging in protected activity.

Complainant's Disparate Treatment Claims and Arguments

Complainant argues that because of his race (Black), he was subjected to disparate treatment on a number of occasions.

First, complainant alleges that "after [he] voiced his complaint of disparate treatment in regards to the retirement parties, [he] was scheduled to be on call to do stress tests over the upcoming weekend." *Complainant's Opp.*, page 3, ¶1. However, avers Complainant, his co-worker who "was not black," and who was hired after him, was not required to work weekend duty. But, upon approaching his supervisors with his employment agreement stating that he only had to work weekdays, he was told that they would think about what would be done, and that his refusal to work could put his job in jeopardy. Id. ,

Complainant offers as evidence and support for this declaration, a copy of his **Discrimination Complaint** entered as Exhibit No. 5, which essentially repeats the allegation alleged, at page 2, ¶c, and nothing more.

Complainant also alleges that he was not trained on a new GE cardiac sonography machine for the same length of time as a "similarly situated co-worker," who received two (2)-days in-house, and one-week off- site training. *Id. at* ¶2. And because of this lack of training, alleges Complainant, he was issued a written reprimand on January 21, 2000 for "failure to use the machine when no one was available to assist him." *Id. at* ¶2. Complainant offers as support for this allegation, his Exhibit No.7, which is a copy of the transcript of his deposition at page 98. That document does not substantiate this allegation. It highlights Complainant's response to a question about the time the policy took effect, with respect, presumably to employees using the GE machine over the HP machine. Complainant states that the policy was implemented "to target' [him] because he did portable echocardiograms a lot."

> **In fact, most of them I did portable because to me it's faster. And I don't like sitting in one spot. It drives me insane. So I felt like, you know, I could go out and do them portably. I can get them done faster."** *EXHIBIT VII, Spires Deposition at page 98.*

Complainant states that in late 1999, a sign-in/sign-out policy was initiated for employees. And in early January 2000, when Complainant and a similarly situated non-black coworker were leaving the floor together, the supervisor reminded the co-worker to sign out but did not accord the same reminder to Complainant. Later on that month, Complainant was suspended for two (2) days for "failing to properly sign in and out while other similarly situated co-workers were not reprimanded when they failed to properly sign in." For this allegation also, Complainant offers his Exhibit #7 (SEE ABOVE) which is a copy of the transcript of his deposition at page 98. Contrary to Complainant's beliefs, Exhibit No. 7 does not provide evidence or support for his accusations. However, Respondent provided evidence that this was not an occasional

situation, that Complainant on six (6) different occasions in January, did not sign in. *Respondent's Exhibit No. 6 And*, it is noted that Complainant does not controvert that evidence.

Finally, Complainant alleges disparate treatment based on the hearsay of "other Black employees [who] voiced their opinion that Respondent's disciplinary actions against him were based on racial discrimination. " *Id. at* page 4, ¶1. But as is the norm with the Complainant, there is no proof to substantiate this allegation, by way of affidavits or depositions or any type of discovery from the "other Black employees. "

Respondent's Response to Complainant's Allegations of Disparate Treatment

Respondent does not dispute that the Complainant was asked to work on weekends, but states that when Complainant pointed out to the supervisors that he was not available for the weekend call, and never had to be available, the supervisors essentially rescinded the request. *Respondent's Motion for Summary Judgment*, page 15, ¶4. Complainant corroborates this statement in his Complaint of Discrimination offered as Exhibit No. 5, as follows, "later that afternoon I was told that I did not have to work."

With regard to the January 21, 2000 write up, Respondent states that it was "a mere warning with no employment consequences whatsoever." *Respondent's Motion for Summary Judgment*, page 15, ¶4. Respondent's support for this "warning" is found in its Exhibit No. 5, which is the Employee/Manager Interaction Form. That Form states that the type of action with regard to the "reluctance of the Complainant to use the GE machine" is an "official warning." *Respondent's Exhibit 5, page 2.* The Form also states that the Complainant is expected "to use GE machine at all times unless there are

reasonable barriers" and that the "next occurrence will result in another official written warning and 2-day suspension without pay." *Respondent's Exhibit No. 5, page 2.*

Finally with regard to the sign-in and sign-out policy, the Respondent submits the Employee/Manager Interaction Form dated January 31, 2000. It is a two-day suspension from 2/1/00 to 2/3/00 of the Complainant for "neglecting to sign in or out on six (6) occasions over the last 2 weeks; this pattern is worsening." *Respondent's Exhibit No. 6, page 1.* Also attached to the Form is the attendance record of the Complainant which indicates the six (6) "failures to sign in or out during the month of January 2000."

The Commission notes the additional exhibits entered by the Respondent concerning Complainant's work behavior and ethics, or lack thereof. It is noted by way of said exhibits in Respondent's Reply to Complainant's Opposition Motions for Summary Judgment (hereinafter Resp. Reply) at Exhibit No. 3, Memo dated September 14, 1999 outlining a meeting with the Complainant to discuss his performance as Echo Tech. The memo, from Richard Katz[16] to Dawn Jones, addresses, inter alia, missing cases, minimal communications about leftover cases, incomplete acquisitions, and incomplete recordings of completed cases. The memo then recommends "better teamwork and communication and an emphasis on better echo studies." *Resp. Reply at Exhibit No. 3, page 1.*

The second memo contained in the exhibit is dated October 22, 1999 from Richard Katz to Dawn Jones, outlining continuing deficiencies with Complainant's work, "after a brief improvement." *Resp. Reply at Exhibit No. 3, page 2.* The memo goes on to state that the recipient talked to the Complainant about "extending his probationary period … assuming he is on probation." *Id.*

[16] It is later noted that Richard Katz is a Medical Doctor in the ED.

There is a follow up memo addressed to Kevin Castle from Richard Katz indicating that the writer met with the Complainant to express Dr. Katz' concerns, and to try to meet with the Complainant, Dr. Katz, and others to resolve the issues and others in the "heart station."

Analysis of Disparate Treatment Based on Race

Under the disparate treatment analysis, Complainant must show that race played a role in Respondent's decisions to write him up and to counsel him regarding his refusal to use the new GE machine, and his failure to sign in and out. Also, Complainant's allegation that he was subject to disparate treatment at his workplace based on his race requires that he establish a prima facie case as follows: (1) he is a member of a protected class; (2) he suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. *Brown v. Brody,* 199 F.3d 446, 452 (D.C. Cir. 1999). He cannot prevail, however, unless his employer took some adverse action because of his membership in a statutorily protected group. *Forkkio v. Powell*, 353 U.S. App. D.C. 301, 306.

Any action beyond termination can be deemed an adverse action, but not all personnel decisions with negative consequences for the employee necessarily qualify as adverse actions. To be legally sufficient, the action must have had "materially adverse consequences affecting the terms, conditions, or privileges of [Complainant's] employment or future employment opportunities." *Brown, supra,* 199 F.3d at 457. A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. Thus changes such

as demotion, undesirable reassignment or the loss of a bonus may be sufficiently significant. *Carter v. Greenspan*, 2004 U.S. Dist. LEXIS 2553 . But actions imposing purely subjective harms, such as dissatisfaction or humiliation,, are not adverse. *Id.*

The Commission agrees with Respondent that the Complainant's claim of race-based disparate treatment is not actionable under the Act, because to be legally sufficient, the action must have had materially adverse consequences affecting" the employee's employment terms, conditions, or privileges. *Carter, supra,* U.S. Dist. LEXIS 2553 (February 19, 2004). Respondent has provided sufficient evidence that Complainant did not experience any change(s) in his job responsibilities. In fact, there is sufficient evidence from the Respondent to indicate that they wanted to work with Complainant in an effort to improve his work product.

Complainant admits that the Respondent did not pursue the directive for him to work over the weekends once he asserted the terms of his employment agreement, and the matter was dropped. It is noted that the two supervisors were new to the functions of the office and were implementing new policy in an effort to overcome what heretofore had been a loosely run department.

With regard to the use of the GE machine as opposed to the HP machine, Complainant admits that he wanted to continue to use the HP machine, notwithstanding the directive for him to use the GE machine. He stated in his deposition testimony that **I did portable because to me it's faster, and I don't like sitting in one spot. It drives me insane. So I felt like… I could go out and do them portably.** *EXHIBIT VII, Spires Deposition at page 98.* This is in effect the "smoking gun" that demonstrates

Complainant's resistance to using the GE machine, has nothing to do with his statement in his discrimination complaint that he was not adequately trained.

Pertaining to Complainant's claim of disparate treatment because he had failed to sign in and out as ordered, and was disciplined, he offers no support that he was singled out for the policy. Respondent offers by way of support, the sign in and out sheet and documentation from the supervisors that the policy was implemented for all employees. Complainant offers nothing to support his claims, either in the form of affidavits or answers to interrogatories, just his own biased assertions based on his belief(s).

Finally, the remarks of other blacks that Complainant was being discriminated against because of his race are hearsay and can be used at an administrative hearing. However, to overcome a summary judgment motion, the hearsay must be substantiated through documentary evidence from the co-workers. Unfortunately, all the Commission has before it are the vague and bald allegations of the Complainant. As aforementioned, a party opposing a motion for summary judgment may not rest upon mere allegations or denial … [and] should set forth specific facts showing there is a genuine issue or issues for trial. *Burke, supra*, 2002 U.S. App. Lexis 6773 (D.C. Cir).

Conclusion

The Commission therefore concludes that the submissions Complainant has provided to oppose the grant of summary judgment are insufficient to defeat Respondent's motion. Complainant in his allegations of disparate treatment and retaliation failed to show that the GWU Medical Center "took the challenged actions because of his race." *Id.* at page 10. Indeed the Respondent has shown, without dispute,

that its reasons for the action against the Complainant were not a pretext for unlawful discrimination.

Therefore the Commission finds that Respondent's explanation for the termination was neither retaliatory nor pretextual, and that Complainant was not subjected to disparate treatment based on his race (Black). Moreover, the Commission agrees with Respondent that management acted responsibly to Complainant's threats of workplace violence, and terminated him because of such egregious conduct. Complainant's threats to commit actions of violence against his two supervisors "surely justify the termination." *Jones, supra,* 2002 U.S. Dist. LEXIS 17032 (D.C. Cir. 2003).

For the above-stated reasons and more, the Commission affirms the Hearing Examiner's recommendation, and accordingly, grants summary judgment for the Respondent. Any Party adversely affected by this Final Decision and Order of the Commission may file a written application for reconsideration with the Chairperson within fifteen (15) calendar days of receipt of the Final Decision and Order in accordance with §431.1 of Title 4, District of Columbia Municipal Regulations.

So Ordered this 26th day of April 2004.

FOR THE COMMISSION

_____	_____
DATE	Reverend Susan Blue Commissioner
_____	_____
DATE	Bro. Donald F. Lippert Commissioner
_____	_____
DATE	Christina Fleps, Esq. Commissioner

Copies to:

Jewell T. Little
441 4th Street, N.W., Suite 570N
Washington, DC 20001

Alan S. Block, Esquire
Andrew Marcus, Esquire
1250 Eye Street, N.W., Suite 600
Washington D.C. 20001

Commission File
District of Columbia Commission on Human Rights
1 Judiciary Square, 441 4th Street, N.W., Suite 290N
Washington, DC 20001